No. 32.

U. S. Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

HORATIO T. BARLING AND JAMES EVA,
Plaintiffs in Error,

vs.

BANK OF BRITISH NORTH AMERICA,
Defendant in Error.

APPELLANT'S BRIEF.

DANIEL TITUS,
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Defendant in Error.

Appellants' Brief.

STATEMENT OF THE CASE.

Writ of Error to the Circuit Court, Ninth Circuit, Northern District of California.

The complaint alleges that the plaintiff is a corporation, organized under the laws of Great Britain. That the defendants are citizens of the State of California. That the Alaska Improvement Company is a corporation organized under the laws of California, and having a capital stock of 25,000 shares, of which 20,000 shares have been subscribed for. And that the defendant Barling is the owner of 6,500 shares, and that the defendant Eva is the owner of 5,000 shares of said capital stock.

That the Alaska Improvement Company executed its bill of exchange, requiring the firm of William T. Coleman & Co. to pay to itself the sum of $2,740. This bill of exchange was endorsed in blank, and subsequently came to the plaintiff by endorsement from Wm. T. Coleman & Co.; and that it has not been paid; and that the plaintiff seeks to recover, of the two defendants named, their proportion of said indebtedness as stockholders of the drawer of the said bill.

There are three counts in the complaint, all of similar nature, each of which is based upon the liability of the defendants as stockholders of the Alaska Improvement Company, for bills of exchange drawn by the Company, and which in due course came to the plaintiff from Coleman & Co., who, by the way, are not shown to be aliens, or to have the right to sue on these bills in this Court.

To this complaint a plea in abatement was filed, which showed that the plaintiff is a banking institution; that it has been engaged in the business of banking in the city and county of San Francisco, State of California, during all the times mentioned in the complaint; and that it acquired the bills of exchange set forth in the complaint, in the general conduct of its said banking business.

That the said plaintiff has not complied with the law of 1876, and which is especially referred to in said plea in abatement, and a portion of which is therein set forth.

This statute requires of all persons and corporations engaged in the business of banking in this State semi-annually to make and publish, and file for record, statements under the oath of its manager, of the amount of money paid into the treasury of said Bank, the actual condition and value of its assets and liabilities, and where the same are situated. In other words, the statute requires of persons engaged in the business of banking, that they shall twice each year give to the public through the press, and make a permanent record in the Recorder's Office, of certain facts which go to the solvency of the Bank, and its right to become the custodians of depositors' funds.

To this plea in abatement the plaintiff interposed a demurrer, on the ground that it did not constitute facts sufficient to show that the action should abate. This demurrer was sustained. (See page 16 of Transcript.) And the ruling of the Court in this behalf is assigned as error. (See page 28 of Transcript.)

After the demurrer to the plea in abatement was sustained, the defendants demurred to the complaint, and for grounds of demurrer specified that the complaint did not state facts sufficient to constitute a cause of action, and that the Court had not jurisdiction of the person of the defendants, or of the subject of the action. (See page 16 of Transcript.)

Afterwards the Court overruled said demurrer (page 17 of Transcript), which is further assigned as error. (Page 28 of Transcript.)

After the demurrer to the complaint was overruled, the defendants filed their answer to the complaint; and afterwards the case was tried, submitted to the Court for its decision, and a judgment therein was rendered against the defendants, as prayed for in the complaint. (Page 25 of Transcript.) Said judgment and decision are further assigned here as error. (Page 29 of Transcript.)

The three grounds of error, briefly stated, are:

First: That the Court erred in sustaining the plaintiff's demurrer to the defendant's plea in abatement.

Second: The Court erred in overruling the defendant's demurrer to the plaintiff's complaint.

Third: The Court erred in rendering a judgment for the plaintiff and against the defendants, as prayed for in the plaintiff's complaint.

In 1876 the Legislature of the State of California passed an Act "Concerning Corporations and Persons engaged in the Business of Banking."

Statutes 1875–6, 729. This Act provided, amongst other things, that every corporation and all persons and every person hereafter doing a banking business in this State shall, in January and July of each year, publish in at least one newspaper published in the county in which the principal office of said corporation may be situated, or in which said person or persons may reside, and also file for record in the Recorder's office of said county, a sworn statement, verified in the case of any such corporation by its President or Manager, and by its Secretary or Cashier, of the amount of capital actually paid into such corporation or into such banking business; and should also make, publish and file for record in the Recorder's office of said county, in January and July of each year, a like sworn statement of the actual condition and value of its assets and liabilities, and where such assets and liabilities are situated. Sections 1 and 2 of said Act.

Section 4 of the Act provides how the statements should be verified in case the banking corporation was foreign. A penalty was attached to this Act for the violation of the same, as is found in Section 3 thereof, and is as follows:

"No Corporation and no person or persons who fail to comply with "the provisions or any of the provisions of this law shall maintain or "prosecute any action or proceeding in any of the Courts of this State, "until they shall have first duly filed the statements herein provided "for, and in all other respects complied with the provisions of this "law."

This Act is applicable to foreign corporations as well as domestic. Section 3 of said Act.

Bank of British North America vs. *Cahn*, 79 Cal. 463.

The Circuit Court of the United States is within the purview of this Statute. *Ex parte Schollenberger*, 96 U. S. Reports, 369.

The Cooper Manufacturing Co. vs. *Ferguson*, 113 U. S. 733.

On page 733, the Court uses this language: "It must be conceded "that if the contract on which the suit was brought was made in vio- "lation of the law of the State, it cannot be enforced in any Court sit- "ting in the State charged with the enforcement of its laws."

On page 732 the Court says: "The right of the people of a State "to prescribe generally, by its constitution and laws, the terms upon "which a foreign corporation shall be allowed to carry on its business "in the State has been settled by this Court: citing numerous cases."

The Judiciary Act of 1789 provides that the laws of the several States shall be regarded as rules of decision in trials at common law, in Courts of the United States.

This is an action under the Statutes of the State of California to recover the amount of a stockholder's liability upon an obligation created by statute, and in such proceeding, it being an action at law, the statutes of the State must govern.

The power of the several States to discriminate against foreign corporations, and even to exclude them from business in the State of California, is well established.

Paul vs. *State of Virginia*, 8 Wall. 168.
Ducat vs. *City of Chicago*, 48 Ill. 173.
Cinn. Mutual Health Assurance Co. vs. *Rosenthal*, 55 Ill. 85.
Consolidated S. S. Co. vs. *Lampson C. S. S. Co.*, 41 Fed. Reporter, 833.
Robinson vs. *Campbell*, 3 Wheaton, 221.

This case was decided by the Supreme Court of the United States in 1818. In it the Court expounded the Judiciary Act of 1789, and the subsequent statutes passed in pursuance thereof. The Court uses this language: "By the 34th section of the Judiciary Act of 1789 it is pro- "vided that the laws of the several States, except where the constitu- "tion, treaties, or statutes of the United States shall otherwise require "or provide, shall be regarded as rules of decision in trials at common "law in the Courts of the United States, and in the cases where they "apply."

The Act of May 8th, 1792, confirms the mode of proceeding in suits at common law in Courts of the United States, and declares that the mode of proceeding in suits in equity shall be according to the rules and usages which belong to Courts of equity, as contradistinguished from Courts of common law.

To the same effect are the following cases:

Boyle vs. *Zacharie*, 6 Pet. 658.
Livingston vs. *Story*, 9 Pet. 655.
Warring vs. *Clark*, 5 How. 475.
Irving vs. *Marshall*, 20 How. 565.

Thompson vs. *R. R. Co.*, 6 Wall. 137.
Pine vs. *Hook*, 7 Wall. 430.
Clark vs. *Reyborn*, 8 Wall. 336.
Van Norden vs. *Morten*, 99 U. S. 380.
Kirby vs. *Lake Shore, Etc., R. R.*, 120 U. S. 138.

It is submitted that the plaintiff 's demurrer to the plea in abatement should have been overruled, and that the Court erred in sustaining the same.

II.

The defendant's demurrer to the plaintiffs' complaint raised the question of the sufficiency of the complaint, and of the jurisdiction of the Court. Upon these two questions the following is submitted.

The question is, Can this suit be maintained by plaintiffs in the United States Courts under the Act of 1887 ? In order to a proper understanding of the provisions of that Act, it will be necessary to refer to the previous Acts regulating the jurisdiction of the United States Courts, and to certain decisions of those Courts construing such prior acts.

The Act of 1789 provided that Circuit Courts should not have cognizance of any suit to recover the contents of any promissory note or other chose in action, in favor of an assignee, unless the suit might have been prosecuted in such Court to recover the said contents if no assignment had been made, except in case of foreign bills of exchange. In 1875, the Act last mentioned was amended, so as to provide that no Circuit Court should have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such Court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant, and bills of exchange. As thus amended, the law in respect to the jurisdiction of the Federal Courts stood until 1887. Under its provisions questions came before those Courts from time to time, as to the right of a subsequent holder of an instrument payable in terms or in effect to bearer, to sue thereon in such Courts, and in the determination of such questions, the following propositions were laid down:

A note payable to bearer is payable to any body, and is not affected by the disability of the nominal payee.

Bank of Kentucky vs. *Wister*, 2 Peters, 318, 326.

A note payable to a party named or bearer passes by delivery,

and a person taking from the party named may maintain a suit in the United States Courts, as the promise to pay is made to bearer.

Bonafee vs. *Williams*, 3 How. 574, 577.

Bonds payable in blank, no payee being named, it being the intention that they should be payable to the holder, as bearer, and that the holder should fill up the blank with his own name, or make them payable to himself or bearer, or to order, are to be regarded, until the blank is filled in, as held by their owner as bearer; and may be sued upon by such holder in the United States Courts, without regard to the citizenship of the person from whom he received them.

White vs. *Vermont & Mass. R. R. Company*, 21 How. 575, 576–8.

The holder of a coupon payable to bearer is not an assignee of the cause of action. He acquires title by delivery, and the promise to pay the bearer in the coupon is a promise to him directly.

Cooper vs. *Town of Thompson*, 13 Blatchf. 434, 437.
Farr vs. *Town of Lyons*, 21 Id. 116.

A note was made by a corporation payable "to the order of Henry Morgan, Prest." Morgan was the president of the corporation, and the object of making the note was to raise money for the use of the corporation. The note was therefore practically made to the corporation itself. It was indorsed by Morgan, "Henry Morgan, President," and disposed of by an agent of the corporation to one Stillman, who "sold and transferred" it to plaintiff. Held, that as there was nothing to show that Stillman was ever a resident of a different State from Morgan, it did not appear that Stillman could have prosecuted an action in the United States Courts against Morgan; and that as the note, by reason of having the seal of the corporation attached to it, was not a promissory note negotiable by the law merchant, plaintiff could not maintain the action against Morgan.

Coe vs. *Cayuga Lake R. R. Co.*, 19 Blatch. 522.

In *Bullard* vs. *Bell*, 1st Mason, 243, Mr. Justice Story said that to bring a case within the exception contained in the 11th section of the Act of 1789, the action must not only be founded on a chose in action, but must be assignable, and the plaintiff must sue in virtue of an assignment. A note, said he, payable to bearer is often said to be assignable by delivery, but in correct language there is no assignment in the case.

It passes by mere delivery, and the holder never makes any title by or through any assignment, but claims merely as bearer. The note is an original promise by the maker to pay any person who shall become the bearer; it is therefore payable to any person who successively holds the note *bona fide*, not by virtue of any assignment of the promise, but by an original and direct promise moving from the maker to the bearer. Under the Act of 1789 it was always held that an obligation payable to bearer, or to an individual or bearer, did not come within the prohibition of suits by assignees.

Chickaming vs. *Carpenter*, 106 U. S. 663, 666–8.

With these decisions before it, Congress in 1887 again amended the law governing the jurisdiction of the United States Courts, so that as it now stands it provides that "nor shall any Circuit or District Court "have cognizance of any suit, except upon foreign bills of exchange, "to recover the contents of any promissory note or other chose in action "in favor of any assignee, or of any subsequent holder, if such instru- "ment be payable to bearer, and be not made by any corporation, un- "less such suit might have been prosecuted in such Court to recover "the said contents if no assignment or transfer had been made."

The Act, as thus amended, has been construed in the following cases:

Newgass vs. *City of New Orleans*, 33 Fed. R. 196.
Goldsmith vs. *Holmes*, 36 Id. 484.
Rollins vs. *Chaffee*, 34 Id. 91.
Steel vs. *Rathbun*, 42 Id. 390.
Wilson vs. *Knox Co.*, 43 Id. 481.
Bank of B. N. A. vs. *Barling*, 46 Id. 357.

These are the only reported cases in which it has been sought to construe the act as last amended. It does not appear that the Supreme Court of the United States has yet passed upon it.

In *Rollins* vs. *Chaffee*, it was held that an instrument made by a corporation, payable to a person named, or order, cannot be sued upon in the United States Courts, under the Act of 1887, unless the assignors could have sued thereon. As has been seen, it was held in *City of Lexington* vs. *Butler*, *supra*, that an instrument of the kind mentioned was, *in effect*, payable to bearer; and that one taking the same by an endorsement in blank could sue thereon, without regard to the citizenship of the original holder. The Rollins case must therefore be taken as holding that an instrument merely *in effect* payable to bearer,

made by a corporation, cannot be sued on in the United States Courts, unless the original holder thereof could have so sued.

In *Steel* vs. *Rathbun*, a promissory note was made to a bank, payable "to the order of , at the office of the Portland Savings Bank," which note, according to the complaint, the bank "sold and delivered" to another party, who "sold and delivered" it to plaintiff; held, upon demurrer to the complaint, that plaintiff was a "subsequent holder" of the note, and came within the prohibition of the Act of 1887.

In *Wilson* vs. *Knox Co*, the opinion was rendered by Justice Miller. The instruments sued upon were county warrants, payable to blank, and the assignment of them to the plaintiff was in blank. Such instruments were, *in effect*, payable to bearer, and passed by mere delivery.

White vs. *Vermont and Mass. R. R. Co.*, *supra.*; Daniels on Neg. Inst., 3d ed., Secs. 145, 146. Nevertheless, it was held that "the "instruments sued upon in this instance, though executed by a quasi "corporation, are not payable to bearer, and are not even negotiable "instruments under the law merchant. It follows, therefore, that an "assignee of the warrants in question had no greater right to sue in this "court than the original payee."

In coming to this conclusion, Justice Miller said: "The clause, if "such instrument be payable to bearer, and be not made by a corporation, operates as an exception to the general rule, and gives the Federal Courts jurisdiction of those suits by assignees, where the action is "founded on an obligation made by a corporation, that is payable to "bearer, and is negotiable by mere delivery. In the light of previous "legislation on the subject, our view is that Congress intended, by the "Act of March 13, 1887, to prohibit suits in the Federal Courts by assignees of choses in action, unless the original assignor was entitled to "maintain the suit in all cases; except suits on foreign bills of exchange, "and except suits on promissory notes, made payable to bearer, and "executed by a corporation."

If the first and last mentioned of these cases hold that an instrument made by a corporation, and only in *effect* payable to bearer, cannot be sued upon in the United States Courts by a subsequent holder, unless the prior holder could have so sued,—and they certainly appear so to hold,—it is plain that plaintiff cannot sue in those Courts upon the bills of exchange in question here, for they are not by their terms payable to bearer. They are only in legal effect so payable. Daniels on Negotiable Instruments, Sec. 130.

But is the action upon the bills of exchange, or even upon the indorsements? Isn't it upon the statutory liability of defendants, and the assignment of such right of action to plaintiff by Coleman & Company? Plaintiff had no dealings with the Alaska Improvement Co. All its dealings were with Coleman & Company. When the corporation transferred the bills indorsed in blank to Coleman & Company, it thereupon became liable to the latter for their payment, and at the same instant arose the liability of its stockholders. The corporation never thereafter assumed any other liability in respect to the bills of exchange, or had any other liability thrust upon it by law; neither did the stockholders ever thereafter become fastened with any other or different liability. Their liability arose simultaneously with that of the corporation, and could not thereafter be in any way affected by the acts of the corporation; and these liabilities of the corporation and the stockholders were none the less liabilities if we look upon the corporation as simply an indorser, and not as maker: the only difference was that the liability was contingent upon the drawers of the bills failing to pay them when due; practically there was no difference at all, because it had precisely the same liability as maker. The fact that the bills were transferable by mere delivery did not alter matters. No new liability was or could be created, upon the part of either the corporation or the stockholders, by a transfer of the bills by Coleman & Company to plaintiff. Such transfer, no matter how made, whether by formal assignment in writing or by mere delivery in law, operated an assignment of all the rights of Coleman & Company arising out of the delivery of the bills to them by the corporation. It must necessarily as a matter of law have so operated, for the bills then belonged to Coleman & Company, and their rights under them could only pass out of them by what in law was an assignment of them.

There is nothing in the decisions *supra*, holding that a subsequent holder of a bill or note payable to bearer, and receiving the same by delivery, takes by delivery and not by assignment, in any way conflicting with this position.

Those cases merely decide that the words assignee and assignment are to be taken in their plain, ordinary meaning, and not in their legal effect; and that thus construed, one who acquires a note payable to bearer by delivery is not an assignee within the meaning of the word as used in the acts construed. Now, what were the rights possessed by Coleman & Co. at the time they became the owners of the bills? Why, all the rights which the making and indorsing of the bills by the corporation under the laws of this State could legally give rise to, to wit:

the right to hold the corporation as maker, and perhaps as indorser of the bills, and the right to require the stockholders to pay their proportionate parts of the same. Those rights existed then, ripe and complete. When Coleman delivered the bills to plaintiff those rights passed to plaintiff, the statutory right as incident to the contract right. If the statutory right did not then pass to plaintiff it never did pass, for the corporation never thereafter entered into any new contract with plaintiff. The failure of Coleman & Company to pay the bills created no new contract between the corporation and plaintiff; it simply made definite and absolute the contingent liabilities theretofore existing upon the part of the corporation and the stockholders.

This right to look to the stockholders which plaintiff acquired from Coleman would seem to be a chose in action, and plaintiff would appear to be an assignee thereof. The right is clearly a chose in action in this State. A thing in action is a right to recover money or other personal property by a judicial proceeding. Civil Code, Sec. 953.

Webster defines a chose in action as "A thing of which one has "not possession or actual enjoyment, but only a right to it, or a right to "demand it by action at law; a personal right to a thing not reduced to "possession, but recoverable by suit at law; as a right to recover money "due on a contract, or damages for a tort, which cannot be enforced "against a reluctant party without suit."

It is a right of proceeding in a Court of law to procure the payment of a sum of money. The term is used in contradistinction to choses in possession, which are chattels of which one is in possession or control, such as coin, wheat, books and the like.

Am. and Eng. Encyclopædia of Law, 235.

The above and foregoing Brief has been somewhat hastily prepared, but I believe the authorities cited and the reasoning conclusively show that the complaint does not state a cause of action, and that this Court has not jurisdiction of the subject of the action, for the reasons therein set forth. That the liability sought to be enforced in this action against these defendants is a statutory liability, and exists only by reason of statutory provisions, and is within the meaning of the law a chose in action, and has come to the plaintiff by assignment of the bills of exchange made by the Alaska Improvement Co., I think too plain for further argument. If this view should prevail, it disposes altogether of the question of jurisdiction in favor of the defendants.

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